LANCE H. MINNIS

IBLA 71-51 Decided May 23, 1972

Appeal from decision by Anchorage, Alaska, state office, Bureau of Land Management, rejecting application (Anch. 062979) to purchase trade and manufacturing site and cancelling claim.

Set aside and remanded.

Alaska: Trade and Manufacturing Sites -- Settlements on Public Lands

> By section 5 of the Act of April 29, 1950, occupancy of a trade and manufacturing site claim prior to a notice of settlement will not be considered as meeting the occupancy requirements of the trade and manufacturing site law; the Act of April 29, 1950, however, does not bar consideration of improvements made prior to the notice of settlement in determining whether there are the required improvements needed to purchase a trade and manufacturing site.

Alaska: Trade and Manufacturing Sites -- Rules of Practice: Hearings

> The Bureau of Land Management's rejection of an application to purchase a trade and manufacturing site will be set aside on appeal where the applicant requests a hearing, asserts that he conducted a commercial enterprise on the claim, and has alleged sufficient facts in support of the application to warrant a hearing before there can be a determination that the requirements of the law have not been met.

APPEARANCES: A. Robert Hahn, Jr., Hahn, Jewell and Farrell, attorney for appellant.

OPINION BY MRS. THOMPSON

Lance H. Minnis has appealed to this Board from a decision by the chief lands adjudicator, Anchorage, Alaska, state office, Bureau of Land Management, dated August 28, 1970, rejecting his application

to purchase an 80-acre tract as a trade and manufacturing site and canceling his claim. The primary reason given for the action was that the five-year statutory life of the claim had expired and the applicant had not shown that he had met the requirements of the trade and manufacturing site law and the regulations thereunder.

Purchase of a trade and manufacturing site is permissible under the requirements of section 10 of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1970) (formerly set forth at 48 U.S.C. § 461 (1958)), which provides that:

> Any citizen . . . in the possession of and occupying public land in . . . Alaska in good faith for the purposes of trade, manufacture or other productive industry may each purchase one claim . . . upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry . . .

Section 5 of the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1970) (formerly set forth at 48 U.S.C. § 461a (1958)), requires claimants to file a notice of occupancy within ninety days from the initiation of the claim in order to be given credit for the occupancy maintained in the claim prior to the filing of the notice or an application to purchase, whichever is earlier. It then provides:

> Application to purchase claims, along with the required proof or showing must be filed within five years after the filing of the notice of claim * * *.

In his notice of settlement claim filed on August 3, 1965, the applicant specified April 1, 1962, as the date of his settlement or occupancy, adding "this year, June 7, 1965." He stated that his application was a refiling of "T&M A056962." For improvements, he listed "clearing, cat-trails, cabin." He stated he desired the site for the purpose of establishing a wilderness resort.

Because of the requirements of section 5 of the Act of April 29, 1950, we may not consider occupancy of the claim prior to the date of the applicant's notice of settlement filed August 3, 1965, as meeting the requirements of occupancy for the purposes of trade, manufacture or other productive industry, under the trade and manufacturing site law of May 14, 1898. The Act of April 29, 1950, however, does not expressly bar consideration of improvements constructed before the notice of settlement. Therefore, all improvements shown by the applicant may be considered to ascertain whether the requirements of the Act of May 14, 1898, as to improvements have been met.

The land office decision quoted from regulation 43 CFR 2562.3(d)(i), which provides that the application for a trade and manufacturing site must show:

> That the land is actually used and occupied for the purpose of trade, manufacture or other productive industry when it was first so occupied, the character and value of the improvements thereon and the nature of the trade, business or productive industry conducted thereon and that it embraces the applicant's improvements and is needed in the prosecution of the enterprise. A site for a prospective business cannot be acquired under section 10 of the Act of May 14, 1898 (30 Stat. 413; 48 U.S.C. 461). [Emphasis added].

Appellant contends that the statement underlined in the regulation quoted above "is patently ridiculous" and that the adjudicator has in effect concluded that the applicant did not comply with the Act because development was not complete at the time of first occupation. Nothing in the adjudicator's decision indicates that the improvements had to be constructed or that all acts of occupancy had to be performed when the land was first occupied. We believe appellant is misconstruing the import of the language in the regulation. We agree that all of the requirements could not be met when the land is first occupied. A fair interpretation of the regulation is that when land is first occupied it must be for the purpose of trade, manufacture or other productive industry, for the occupancy to be creditable, rather than for some other purpose. Thus, land which was first occupied for agricultural purposes as a homestead claim, for example, would not then meet the requirements of occupancy for trade, manufacturing, or other productive industry purposes.

In rejecting appellant's application, the Bureau's decision emphasized that his application to purchase showed only an infrequent use by customers unproductive of gross receipts.

Generally, appellant contends that the decision below did not adequately consider the application because it did not analyze the factual statements shown on the application and accompanying documents. Appellant requests a hearing of the appeal on its merits and an oral argument. Appellant asserts positively that he has in good faith considered himself to be engaged in a commercial enterprise and that it would be unconscionable for the Government "to wipe out the bona fide efforts and development of the site" without a close examination.

In reviewing the record of this appeal we find no indication that a field examination was ever made of appellant's claim site. We also note that some of appellant's showings submitted with his application lend support for the Bureau's conclusion. Generally, there are some inconsistencies and some uncertainties in appellant's showings. For example, in his application to purchase, appellant estimated the total value of his improvements on the claim to be approximately $47,500, and listed the improvements, the dates, and their cost as follows:

	Approx.
1962 tent foundation	50.00
1962 stone & cement foundation	500.00
1963 A-frame with 1965 Addition	500.00
1969-70 20'x20' A-frame	5000.00
1962-69 Road development & site clearing	41,500.00

He attached a summary of expenses and also referred to an attached "statement of operation" in responding to item 9 of the application form pertaining to the nature of the commercial operation on the land. He also attached a "statement of developments", a map of the site showing improvements, letters from "guests" of the resort, a survey statement, and a few other additional documents to support his application. On appeal, he has submitted photographs and an additional map of the site showing the location of photographs of improvements on the claim.

Appellant's alleged value of improvements may not be taken at face value when considered with the showing on his expense summary. Appellant appears to have added every possible expense to reach his total value for improvements. The most affirmative showing of a value for improvements is the listing on the expense sheet of expenses for cabin, materials and labor at a total of $6,137.11. Except for whatever value as improvements may be given to the development of some roads, paths and clearings throughout the tract, that is the only tangible showing of value for an improvement. Appellant relates his other costs to the value of road development and site clearing. The costs may be legitimate business costs of operation but do not necessarily reflect the value of the alleged improvement of the land. A major expense listed on the expense sheet is the 1963-$6,356.05 cost of the applicant's "cat" (caterpillar tractor). Another major item is "Other equipment & tools" at a total of $6,722.90. An additional major item of $8,384.70, listed as "General", "includes gas, oil, freight, advertising, supplies, transportation, issuing licenses, small parts [?] & miscellaneous". The largest single item of expense is the total

sum of $11,982.37 listed as "Interest." There is no explanation of this item. Without more information it cannot be viewed as an actual expense related to the improvements or other costs of the applicant's alleged operation. Some of the expense items, such as the cost of the caterpillar tractor, were made prior to the notice of occupancy in 1965.

As to income, the applicant in his statement of operations stated as follows:

> So far the principal monetary income has been from the use of the D-4 Cat tractor: hauling supplies in for a neighbor in 1965, rental at Hurrican [sic] during 1964 following the earthquake when we could not be on the site, short-time rentals to contractors on the new road during 1968, 69, 70, and Cat and welding service to another neighbor now homesteading nearby.
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> Aviation gasoline is available, and has been sold to pilots landing on the road (which is completed in front of the site, but not opened to traffic.)

In his preliminary statement showing expenses and income, the applicant showed a total income of $2,110. This was not broken down except by years ($348 - 1964; $48 - 1965; $1214.85 - 1967; $464 - 1969; and $1250 - 1970), which figures, incidently, do not completely coincide with the above statement.

Since the Bureau has not disputed the facts shown by the applicant, they must be taken at face value. Thus, even though his showings of use of the claim as a resort are not convincing, nevertheless, he has asserted some commercial use either in the nature of a trade or a headquarters site operation. This is reflected especially from his statements concerning the use of his caterpillar tractor and the sale of aviation gasoline. We believe sufficient facts have been alleged in support of his application to warrant a hearing before there can be a determination that the requirements of the law have not been met. The situation in this case is much like that in Clayton E. Racca, 72 I.D. 239 (1965), where a hearing was ordered to clarify whether the facts were sufficient to meet the requirements of the law, and, if so, the extent of the acreage within the claim which met the requirements. See also, Don E. Jonz, 5 IBLA 204 (1972).

To conclude, this case will be returned to the Bureau for reconsideration and the ordering of a field examination, if necessary. Also to be reconsidered is the question of the status of the land. The record shows that a state selection application has been filed for the land, but it does not clearly establish the priority of rights as between the State of Alaska and the appellant. This issue should be resolved before any further action is taken on the purchase application.

If the Bureau decides a contest is warranted against the purchase application, then a hearing must be held before a Departmental hearing examiner. At such a hearing the appellant would bear the ultimate burden of presenting evidence of facts to establish that the requirements of the law have been met. Don E. Jonz, supra.

In view of the above conclusion, appellant's request for an oral argument on this appeal is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision appealed from is set aside and the case is remanded to the Bureau for action consistent with this decision.

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Joan B. Thompson, Member

We concur:

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Frederick Fishman, Member

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Anne Poindexter Lewis, Member